



Conservation Law Foundation

December 9, 2004:

Secretary Stephen Pritchard
Massachusetts Executive Office of Environmental Affairs
MEPA Unit
100 Cambridge Street, Suite 900
Boston, MA 02114

RE: **Weaver's Cove Energy, LLC; Fall River Pipeline, LLC**
EOEA Number 13061
FERC Docket Numbers CP04-36-000 and CP04-41-000

CONSERVATION LAW FOUNDATION'S MEPA SSDEIR COMMENTS

Dear Secretary Pritchard:

The Conservation Law Foundation (CLF) is a private, non-profit 501(c)(3) organization dedicated to solving environmental problems that threaten the people, communities, and natural resources in New England. To further these goals, CLF undertakes litigation and other legal advocacy on behalf of its members' interests; promotes public awareness, education, and citizen involvement in the conservation of wildlife and resources; and supports programs for the conservation of wildlife and their habitats.

Thank you for the opportunity to submit written comments in response to the Second Supplemental Draft Environmental Impact Report (SSDEIR) filed with the Massachusetts Executive Office of Environmental Affairs, Massachusetts Environmental Policy Unit (MEPA) by Weaver's Cove Energy, LLC and Fall River Pipeline, LLC (collectively "WCE") on or about October 31, 2005. Many of our members live in the area affected by the WCE Project ("the Project"), and will be directly affected by the development and operation of the Project. CLF and its members are concerned about the impact of the Project because it will result in significant detrimental environmental impacts, including but not limited to destruction of fish and riparian habitat, impaired water quality, reduced dissolved oxygen, negative impacts on wildlife, and threats to human health and quality of life.

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SUMMARY OF COMMENTS

CLF has reviewed the SSDEIR, and we believe that it contains serious deficiencies and neither complies with existing laws and regulations nor adequately satisfies or addresses the concerns previously raised by CLF or by the Secretary (as set forth in the Certificate).

While CLF has many fundamental concerns about the Project, these comments are focused on two concerns in particular. First, the SSDEIR addresses a Project that can no longer be built because of recently-enacted federal law. The SSDEIR omits any serious discussion about the impact of the new federal law on the viability of the Project and the effect of the law on the Project's originally stated purpose; i.e., providing new supplies of LNG to the region by Q4 2007. Secondly, the SSDEIR addresses a Project that cannot possibly meet its own statement of purpose, yet refuses to adequately analyze other viable alternatives that can meet the Project's originally stated purpose. The SSDEIR is critically flawed because it fails to address these issues.¹

Importantly, the material changes, taken together with the significant deficiencies in the alternatives analysis, lead to the following conclusions:

- I. The enactment of new federal law creates a "Fatal Flaw" whereby the project is prohibited from meeting its own objectives;
 - II. Even if the Project is somehow found not to suffer from a "Fatal Flaw", the alternatives analysis is still critically flawed because the SSDEIR does not reflect or consider the changes in the Project's originally stated purpose, nor does it correct deficiencies in the inadequate alternative analysis previously supplied. These flaws require WCE to submit a new Draft Environmental Impact Report (DEIR) or a Third Supplemental Draft EIR (TSDEIR).
- I. **RECENTLY ENACTED FEDERAL LAW PROHIBITS CONSTRUCTION OF THE PROJECT**

The SSDEIR fails to substantively address the enactment of SAFETEA-LU § 1948 on August 10, 2005, which would prohibit the Project from being successfully constructed and thus comprises a fatal flaw for the Project. A "fatal flaw" in a project has been defined as an aspect of the project that can not be mitigated due either to prohibitive cost or technical difficulties. See, In the Matter of the Petition of Sithe West Medway Development LLC, (EFSB 98-10). In this case, a fatal flaw is brought about by operation of SAFETEA-LU § 1948². This new federal law requires the maintenance (and improvement of) the existing

¹ We believe the Project changes – both those brought about by operation of federal law and those identified at the Project's own initiative – are material and sufficient to trigger the requirement for mandatory submission of a Notice of Project Change pursuant to 301 CMR 11.10(1)¹ and 301 CMR 11.10(5)¹.

² H.R. 3: the Safe, Accountable, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) provides, in relevant part, as follows: § 1948 Emergency Service Route. Notwithstanding any Federal law, regulation, or policy to

Brightman Street Bridge, which makes locating the LNG terminal at the proposed project site impossible because LNG tankers can not pass under the existing Brightman Street Bridge.³ This federally mandated restriction thereby renders useless any LNG terminal at the Project site, and clearly leaves the project unable to meet its own objectives.

MEPA environmental impact reports are prepared by the project proponent and, as such, the MEPA review process relies upon the project proponent to raise and respond to the existence of a fatal flaw. Despite being aware of the fatal flaw which § 1948 presents, WCE offers a dismissive and inadequate response in the SSDEIR, by stating:

Although opponents of Weaver's Cove contend that this legislative maneuver will effectively block the project, they are not correct. The provision was hastily enacted, is legally and constitutionally flawed, and will have numerous unintended consequences for Massachusetts taxpayers that were not taken into consideration by its sponsors... Weaver's Cove is currently undertaking measures that will address section 1948, and is confident that this ill-advised provision will not prevent the project from going forward on a timely basis. (SSDEIR 12-6, 12-7).

The SSDEIR conveniently avoids providing any support for WCE's contention regarding § 1948's alleged "unlawfulness," nor does WCE provide an alternative scenario under which the Project could be constructed so that LNG tankers could navigate the Taunton River and arrive at the proposed LNG terminal while complying with the new law. Most importantly, the SSDEIR omits discussion on why or how § 1948 makes it impossible for the Project to fulfill its stated purpose, including its objective of meeting a Q4 2007 in-service date.

Obviously, the effects of § 1948 will materially affect the Project's purpose, and the existence and effects of this federal law were certainly known by WCE when it prepared and submitted its SSDEIR. WCE's failure to explain how the Project can meet the Project Purpose in the wake of the enactment of § 1948 leaves the SSDEIR fundamentally deficient.

II. THE SSDEIR ALTERNATIVES ANALYSIS IS FLAWED AND A NEW DEIR MUST BE PREPARED

The purpose of the Project, as articulated by WCE in its MEPA filings, was to provide a new supply of natural gas for New England and specifically, for the southeastern portion of Massachusetts and Rhode Island, by Q4 2007. The identified public benefit was to provide new natural gas supplies to address an expanding demand; the project purpose was to respond to the need for natural gas in the region to avert a shortfall. The public benefit and project purpose helped to frame the parameters for MEPA review.

the contrary, no Federal funds shall be obligated or expended for the demolition of the existing Brightman Street Bridge connecting Fall River and Somerset, Massachusetts, and the existing Brightman Street Bridge shall be maintained for pedestrian and bicycle access, and as an emergency service route.

³ The feasibility of the Project, as discussed in the Coast Guard Navigational Assessment in 2003, is contingent on demolition of the existing Brightman Street Bridge.

More importantly, the Project purpose shaped the analysis of alternatives for increasing natural gas supplies by Q4 2007. Alternatives considered in that context included efficiency and conservation, infrastructure and pipeline expansion, and increased viability and desirability of offshore facilities.

However, the Project's purpose has changed materially, in that the in-service date of Q4 2007 can no longer be achieved (and indeed, the Project as defined by WCE can never be built unless a solution is found for LNG tankers to gain access to the proposed terminal). This material change caused the SSDEIR alternatives analysis to be deficient for at least two reasons:

1. The alternatives were improperly judged in accordance with their perceived inability to meet objectives that the Project itself cannot meet; and
2. Having improperly and cursorily dismissed certain alternatives based on this flawed baseline, the SSDEIR fails to adequately compare the merits of viable alternatives in terms of overall environmental desirability.

A. Alternatives were improperly judged based on objectives the Project itself cannot meet.

For a SSDEIR to be adequate, MEPA requires the proponent to describe its project and conduct a rigorous review of alternatives in comparison to the project. In the case at hand, WCE inaccurately described its project (e.g., it cannot satisfy an in-service date of Q4 2007) and then proceeds to compare alternatives based upon that inaccurate project description. MEPA § 301 CMR 11.01(1)(b) provides:

“The Secretary's decision that a review document is adequate or that there has been other due compliance with MEPA and 301 CMR 11.00 means that the Proponent has adequately described and analyzed the Project and its *alternatives*, and assessed its potential environmental impacts and mitigation measures.” (*Emphasis provided*).

In adopting the Project's goal of in-service date of Q4 2007 as one of the objectives by which alternatives were evaluated or summarily dismissed, the SSDEIR failed to consider viable alternatives that can actually meet the Project's generally stated purpose of increasing the natural gas supply to the region). As discussed below, the SSDEIR inappropriately refused to consider project alternatives including:

1. New Canadian Maritime LNG supplies and infra-structure improvements;
2. Proposed offshore facilities such as the Neptune LNG and Northeast Gateway LNG projects;
3. Any *combination* of alternatives, including other LNG facilities, efficiency, conservation, and renewables.

Having summarily dismissed these alternatives that should have been rigorously explored, the SSDEIR then fails to compare the overall environmental desirability of the alternatives to the Project.

1. **Canadian Maritime LNG Supplies and Infra-Structure and Pipeline Improvements Were Not Adequately Considered.**

On July 15, 2005, Repsol YPF entered into an agreement with Maritimes and Northeast Pipeline to transport 750,000 MMBtu/d from Canaport LNG by 2008. In September 2005, Canaport LNG, the LNG receiving and regasification facility proposed by Irving Oil and Repsol for Saint John, New Brunswick, Canada, commenced construction, with an anticipated in-service date of 2008. **Attachment 1** at 4.

On July 15, 2005, Anadarko Petroleum Corp. entered into an agreement with Maritimes and Northeast Pipeline to transport 813,000 MMBtu/d from Bearhead LNG by 2008. Bear Head LNG awarded the first construction contracts for its marine offloading, LNG storage and regasification project in August 2005, with an anticipated in-service date of 2007. **Attachment 1** at 4.

In September 2005, Maritimes and Northeast Pipeline (which notably brings natural gas from the Canadian Maritimes to the New England region) submitted its pre-filing to the Commission for its Phase IV Expansion. The expansion would provide 1,563.00 MMcf/d of additional pipeline capacity into the New England region, with subscribed supply as described above. **Attachment 2.**

The SSDEIR devotes less than one page (3-27) to these projects and pipeline expansions and omits completely any discussion of the pipeline settlements and the commencement of construction, as well as the October 14, 2005 notification from the Federal Energy Regulatory Commission (FERC) concurring with the proposed schedule of February 2007 for FERC approval of the Maritimes and Northeast Pipeline expansion under Docket Number PF05-17-000. **Attachment 3** at 3. The SSDEIR is inadequate because it should have discussed how the new Canadian Maritimes LNG projects already underway will meet the Project Purpose of meeting local supply for natural gas, without need for the Project.

2. **Offshore alternatives such as the Neptune and Northeast Gateway LNG projects were eliminated as viable alternatives on inappropriate grounds.**

The SSDEIR unreasonably rejected the Northeast Gateway and Neptune LNG offshore facilities as reasonable alternatives to Weaver's Cove on the basis of unreliable in-service times and questionable reliability. As discussed below, these bases for elimination are inappropriate.

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Given that the WCE Project has an unreliable in-service time and could not reasonably be expected to go into service before 2010 even if it could be built at all, it is surprising and inappropriate for the SSDEIR to dismiss the offshore facilities as viable alternatives on the basis of unreliable in-service times or on the basis that the technology is supposedly unproven. While the SSDEIR does provide a cursory description of these projects, it omits several material facts. First, Northeast Gateway received notice, on August 19, 2005 (published in the September 2, 2005 Federal Register; 70 FR 52422) from the United States Maritime Administration that its application, submitted on June 13, 2005, was deemed complete. The Deepwater Port Act of 1974 requires that the Maritime Administration issue a decision on the license application not later than July 31, 2006. The Northeast Gateway Project anticipates an in-service date by Q1 2008.

The SSDEIR also omits the fact that the Neptune LNG LLC project also received notice from the Maritime Administration, on September 30, 2005 (published in the October 7, 2005 Federal Register; **70 FR 58729**) that its application, submitted to the Maritime Administration on February 17, 2005, was deemed complete, requiring that a decision on the license application be issued not later than September 5, 2006. The Neptune LNG Project anticipates an in-service date of Q4 2008 – Q1 2009. Both of these projects anticipate the ability to provide additional sources of natural gas to the region well in advance of any date when the WCE Project might possibly be complete, if it could be constructed at all.

The SSDEIR also inappropriately failed to correct a significant representation previously made by WCE as part of its effort to dismiss the offshore facility alternatives; material information contradicting WCE's representations has very publicly arisen, yet was not included in the SSDEIR. . The primary basis upon which the Project premised its rejection of a full consideration of these projects as viable alternatives has been the claim that offshore facilities cannot withstand harsh weather conditions in New England and that only one project using similar technology to the Northeast Gateway Project; the Energy Bridge Project located in the Gulf of Mexico; has been deployed and remains untested in the face of severe storms.

This year's hurricanes dispelled any notion that offshore technology such as that proposed for the Northeast Gateway project is unproven. As set forth in **Attachment 4**, the Energy Bridge facility not only withstood these massive storms, it did not even suffer an interruption in service, unlike many of the fixed platform facilities.

3. **The alternatives analysis in the SSDEIR is inadequate because it fails to explore alternatives taken in combination with each other.**

Having improperly dismissed the proposed offshore terminals as alternatives, the SSDEIR then failed to consider whether the offshore terminals when combined with pipeline expansions and other sources of natural gas may partially or fully meet the region's LNG demands. In other words, the SSDEIR fails to consider whether these alternatives, when combined with other resources, will provide better long-term solutions and options for our

region's natural gas supply. In particular, the SSDEIR does not analyze whether additional supplies of LNG from other proposed terminals and facilities may reduce the need for peak shaving facilities, and thus eliminate the need for storage facilities for trucking. Nor does the SSDEIR consider whether one or more of the project alternatives taken together with energy efficiency measures or development of renewable energy would meet the legitimate project needs with significantly less environmental impact.

The proper range of alternatives in the SSDEIR should include not only alternatives that will meet the "objective" of the WCE Project; rather the range should include alternative ways to meet the *underlying need or objective* of bringing a new LNG supply to New England to serve the natural gas needs of the New England market, particularly in southeastern Massachusetts and Rhode Island.

The Federal Energy Regulatory Commission's (FERC) Final Environmental Impact Statement (FEIS) acknowledged that combined sources could meet the Project's objectives. Clearly, WCE is aware of the FEIS findings, yet the SSDEIR failed to explore this option at all or to explain why such a combination would not be viable. FERC concluded in its system alternatives section of the FEIS, "when considered *independently*, none of the LNG import projects in the region would be capable as serving as an alternative." FEIS at ES-11. However, when considered *together*, several of the projects in or outside of the region could meet many of the project objectives. However, the SSDEIR did not evaluate or consider that alternatives, when combined, could meet the region's peakshaving demand, let alone provide even a brief discussion as to why such an option was eliminated from the alternatives analysis altogether despite comments urging this type of evaluation.⁴

Once WCE was aware of the possibility that "when considered *together*, several of the projects in or outside of the region could meet many of the project objectives," the SSDEIR was obligated under MEPA to discuss and investigate serious alternatives, including an evaluation of a system of combined alternatives that would meet the Project's objectives.

As noted above, comments by CLF and others drew WCE's attention to the viability of considering a combination of pipeline expansion and one offshore facility. While the SSDEIR may have superficially considered some of these alternatives independently, the SSDEIR did not consider them together. As a result, it is impossible for the Secretary to make an informed decision that the Project is preferable to other viable alternatives (whether taken alone or together), and therefore the Secretary should require WCE to prepare a new DEIR or a Third SDEIR.

The SSDEIR also failed to explore the combination of some alternative(s) taken together with energy efficiency and/or renewable energy development. The SSDEIR ignores that the forecast need for LNG is not a weather forecast that predicts natural forces, it is a forecast of a need that can be controlled and managed through such means as promoting energy efficiency. A recent ACEEE report referenced in the FEIS (FEIS at 3-5) highlights the role

⁴ CLF previously filed comments notably urging FERC to consider the expansion of the Maritime and Northeast Pipeline System, which runs from Nova Scotia to Massachusetts in conjunction with the construction of either the Neptune LNG or Northeast Gateway offshore facilities.

that electricity efficiency, demand management and renewable energy development can play in moderating natural gas demand. Moreover, the New England Governor's Conference report, which was also relied upon in the FEIS, (see e.g., FEIS at 1-7 to 1-9), finds that efficiency currently is the cheapest, fastest and best way to meet regional gas supply needs. Yet the SSDEIR did not review these alternatives, and failed to consider the advantages of exploring one of the system or site alternatives *in combination with* energy efficiency and/or renewable energy development. The Secretary should therefore require WCE to prepare a new EIR or a Third SDEIR to explore this combination of viable alternatives.

B. The SSDEIR erred in inadequately comparing the overall environmental desirability of the alternatives to the Project.

The purpose of MEPA and 301 CMR 11.00 is to provide meaningful opportunities for public review of the potential environmental impacts of Projects..., and to assist each Agency in using...all feasible means to avoid Damage to the Environment or, to the extent Damage to the Environment cannot be avoided, to minimize and mitigate Damage to the Environment to the maximum extent practicable. 301 CMR 11.01(1)(a).

Once the SSDEIR prematurely and inappropriately dismissed alternatives because they ostensibly failed to meet the Project's purpose, it failed to adequately explore the overall environmental desirability of these alternatives vis-à-vis the Project. Based on the SSDEIR, it is therefore impossible for the Secretary and the public to discern whether any alternatives (or combinations of alternatives) meet all or most of the Project's objectives while avoiding or substantially lessening any adverse environmental effects of the WCE Project. The SSDEIR's analysis therefore fails to comport with the requirements of MEPA 301 CMR 11.01(1)(b), which mandates that an EIR must "analyze the Project and its alternatives and assess its potential environmental impacts and mitigation measures."

Without a comparison of alternatives in terms of overall environmental desirability and without an explanation of why a course of action is preferable, there can be no assurance that the SSDEIR considered environmental consequences at all. In fact, there is evidence that alternative proposals and existing LNG import and pipeline facilities might offer a substantial measure of superiority with respect to the Project while, simultaneously, meeting the New England region's natural gas demand. The Neptune and Northeast Gateway offshore LNG facilities both would be expected to entail an order of magnitude less environmental impact associated with dredging than the Project. They also pose far less safety risk to the public, given their more remote locations than that of the Project, which is proposed to be sited in a densely populated urban area.

In addition, it appears that the SSDEIR ignored the significant costs of environmental externalities associated with the Project when it compared the Project's costs to those of the offshore (Neptune and Northeast Gateway) projects. WCE has suggested that the Neptune LNG and Northeast Gateway offshore facilities would result in increased costs to natural gas

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customers and, as a result, concludes that offshore projects are economically impracticable. By making costs to consumers the relevant standard, the SSDEIR adopts an unduly narrow definition of costs; costs to consumers include only the direct costs of the project, and exclude costs that the project imposes on the public. For the reasons explained above, the Project proponent's charge under MEPA is to evaluate the environmental costs of the project, the type of costs most frequently omitted in a recitation of direct costs to project proponents. The Commission failed to include the indirect costs of the Project (increased security, increased public safety risk, harm to the Taunton River and Mount Hope Bay) in comparing the Project to the offshore alternatives and therefore failed to conduct the *environmental* cost comparison that is the central purpose of MEPA.

In the end, because WCE prematurely dismissed these alternatives on inappropriate grounds, there is insufficient information in the SSDEIR to support a reasoned analysis as to which of these alternatives is environmentally preferable to the Project. Given the significant inadequacy of its alternatives analysis, we urge the Secretary to require WCE to prepare a new EIR or a Third SDEIR and supplement the alternatives analysis as required.

CONCLUSION

The purpose of MEPA and 301 CMR 11.00 is to provide meaningful opportunities for public review of the potential environmental impacts of Projects for which Agency Action is required. In light of the substantial environmental impacts that the Project is expected to generate and in view of the availability of preferable alternatives, the Secretary should require WCE to submit a new DEIR or a Third SDEIR so that the requisite rigorous analysis of alternatives and re-evaluation of the Project, with its proper purpose in focus, can be performed. Of course, this analysis should be undertaken against the backdrop of recently enacted federal law which effectively prohibits the Project from ever meeting its own objectives.

CLF appreciates the opportunity to submit these comments for your consideration in the MEPA SSDEIR Certification process for the Weaver's Cove LNG Project.

Sincerely yours,

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LIST OF ATTACHMENTS

Attachment 1: Proposed LNG Import Terminal Projects, Northeast U.S. and Eastern Canada (as of 10-17-05) Prepared by the Northeast Gas Association, October 2005.

Attachment 2: September 15, 2005 Request by Maritimes and Northeast Pipeline, LLC for Approval to Use Pre-filing Process for Phase IV Expansion Project and October 14, 2005 Commission Approval in Docket No. PF-015-17-000.

Attachment 3: Planned Enhancements, Northeast Pipeline and Storage Systems (as of 11-7-05) Prepared by the Northeast Gas Associations, November 2005

Attachment 4: Reliability of Energy Bridge Hurricane Katrina Presentation